SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 446

PEOPLE OF THE STATE OF ILLINOIS,
Respondent,
and HERBERT LANG, WILLIAM BOSSINGHAM, DOUGLAS STAUFFER, E. V KEISLING and OMAR SENIFF,
Petitioners,

vs.

ROBERT J. THOMPSON, PAUL IUTZI, IVAN W. HIESER, VIRGIL L. JOHNSON, RICHARD H. GILBERT, DAVID W. BRITTON and JULIUS C. BRISTOW,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Illinois.

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To the Supreme Court of Illinois.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered on May 13, 1969, denying Petitioners' petition for rehearing and adhering to its original opinion rendered on March 13, 1969.

OPINIONS BELOW.

The opinion of the Appellate Court (Appendix A, *infra*, p. A-1) was filed on November 18, 1968, and is reported at 101 Ill. App. 2d 104, 242 N. E. 2d 49. A timely petition

for leave to appeal from the Appellate Court to the Supreme Court of Illinois was filed by the Petitioners. The order of the Supreme Court of Illinois (Appendix B, *infra*, p. A-11) denying the petition for leave to appeal was entered on March 13, 1969; this order is unreported. A timely petition for rehearing (treated as a motion for reconsideration) was filed by the Petitioners. The order of the Supreme Court of Illinois (Appendix C, *infra*, p. A-13) denying the petition for rehearing (motion for reconsideration) was entered on May 13, 1969; this order is unreported.

JURISDICTION.

The judgment of the Supreme Court of Illinois sought to be reviewed was pronounced on March 13, 1969, and was entered on the same date. The order of the Supreme Court of Illinois denying the petition for rehearing was made and entered on May 13, 1969. The jurisdiction of this Court to review the judgment or decree in question by Writ of Certiorari is conferred by 28 U. S. C., Section 1257 (3). This Petition for Certiorari is filed within the time allowed by 28 U. S. C. 2101 (c).

QUESTION PRESENTED.

Did the judgment rendered by the Supreme Court of Illinois deny the petitioners and other citizens, voters, and taxpayers in the purported school district due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America?

CONSTITUTIONAL PROVISIONS AND STATUTES.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat., Ch. 110, Section 26.1 (1967).

(1) Upon timely application anyone shall be permitted as of right to intervene in an action: (a) when a statute confers an unconditional right to intervene; or (b) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by a judgment, decree or order in the action; or (c) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or an officer thereof.

(2) Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (a) when a statute confers a conditional right to intervene; or (b) when an applicant's claim or defense and the main action have a question of law or fact in common.

(3) In all cases involving the validity of a constitutional provision, statute or regulation of this State and affecting the public interest, the State upon timely application may in the discretion of the court be permitted to intervene.

(4) In all cases involving the validity of an ordinance or regulation of a municipality or governmental subdivision of this State and affecting the public interest, the municipality or governmental subdivision upon timely application may in the discretion of the court be permitted to intervene.

(5) A person desiring to intervene shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he proposes to file. In cases in which the allowance of intervention is discretionary, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(6) An intervenor shall have all the rights of an original party, except that the court may in its order allowing intervention, whether discretionary or a matter of right, provide that the applicant shall be bound by orders, judgments or decrees theretofore entered or by evidence theretofore received, that the applicant shall not raise issues which might more properly have been raised at an earlier stage of the proceeding, that the applicant shall not raise new issues or add new parties, or that in other respects the applicant shall not interfere with the control of the litigation, as justice and the avoidance of undue delay may require.

Ill. Rev. Stat., Ch. 110A, Section 301 (1967).

Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding. All rights that

could have been asserted by appeal or writ of error may be asserted by appeal. No formal exception need be taken in order to make any ruling or action of the court reviewable.

STATEMENT OF THE CASE.

On August 5, 1966, a petition was filed with the County Superintendent of Schools of McLean County, Illinois, calling for an election for the purpose of voting for or against the establishment of a community unit school district (Volume II, Exhibit A). On September 15, 1966, a public hearing on said petition was held by the County Superintendent of Schools of McLean County, Illinois, and on September 16, 1966, the County Superintendent of Schools entered an order granting said petition (Volume II, Exhibits C and D). The organizational election was held on November 12, 1966, and on November 15, 1966, the County Superintendent of Schools canvassed the results and declared that the proposition had carried (Volume II, Exhibits F and G).

On November 21, 1966, the County Superintendent of Schools designated the name of the purported new school district to be "Community Unit School District No. 16 in McLean, Woodford, DeWitt, Logan and Tazewell Counties, Illinois" (Volume II, Exhibit G). On January 21, 1967, an election was held to elect the Board of Education for the purported Community Unit School District No. 16; the results of said election were declared on January 24, 1967 (Volume II, Exhibit J). On July 1, 1967, the newly elected Board of Education commenced operation of Community Unit School District No. 16 (Volume III, pages 84 and 88).

On December 22, 1967, the People of the State of Illinois, by the State's Attorney of McLean County, Illinois, commenced a proceeding in Quo Warranto against the Respondents as members of the Board of Education (Volume

I, C-6). In substance the Complaint in Quo Warranto challenged the validity of the purported Community Unit School District No. 16 and the election of its Board of Education. On December 28, 1967, the Respondents filed their Answer and Pleas (Volume I, C-9). The People of the State of Illinois filed a Reply on December 29, 1967 (Volume I, C-22). On December 29, 1967, a hearing on the merits was held before the Honorable Walter A. Yoder, Circuit Judge of the Circuit Court of the Eleventh Judicial Circuit, in McLean County, Illinois; the relief prayed for in the Complaint in Quo Warranto was denied, and the Respondents were found to be lawfully in possession of their offices (Volume I, C-32). A decree was entered by Judge Yoder on January 8, 1968, which ordered and declared that the purported Community Unit School District No. 16 was a legally created community unit school district pursuant to the School Code of Illinois, and which sustained the validity of the offices held by the Respondents (Volume I, C-36).

In the latter part of January, 1968, the Petitioners, who are taxpayers and voters in the purported school district, retained the services of the law firm of Swain, Johnson & Gard to assist the State's Attorney of McLean County in prosecuting the Quo Warranto action. Subsequently, the law firm of Swain, Johnson & Gard contacted the State's Attorney of McLean County and offered their assistance to him. The State's Attorney indicated that the Quo Warranto action was meritorious and that serious legal defects existed in the organization of the purported Community Unit School District No. 16. It was agreed that Swain, Johnson & Gard would assist the State's Attorney in filing the necessary motions, briefs, and other documents, and it was also agreed that in the event Judge Yoder sustained the validity of the purported school district, then the State's Attorney, with the assistance of Swain, Johnson & Gard, would appeal the case to either the

Illinois Appellate or Supreme Court (Volume III, page 223).

On February 6, 1968, a Motion to Vacate the Decree entered January 8, 1968, was filed by the State's Attorney (Volume I, C-49). On February 21, 1968, the State's Attorney's Motion to Vacate was called for hearing before Judge Yoder, and the law firm of Swain, Johnson & Gard filed its Motion for Leave to Enter as Additional Counsel for Plaintiff. Both Motions were heard and the ruling was reserved to a later date by Judge Yoder (Volume I, C-56; Volume III, Page 137).

The law firm of Swain, Johnson & Gard continued to do research on the Quo Warranto action, and the relationship between the State's Attorney and Swain, Johnson & Gard was cordial until on or about April 9, 1968. A few days prior to that time, the State's Attorney had telephoned Mishael O. Gard and indicated that he might not appeal an adverse decision and that he might discontinue further work on the case (Volume III, Page 223). On April 9, 1968, several of the Petitioners, Mishael O. Gard and Jack C. Vieley met in the office of the State's Attorney and discussed, among other things, the possibility of his discontinuance of further legal action. Mishael O. Gard indicated that it was his desire to file a Petition for Leave to Intervene. The State's Attorney promised the Petitioners, Mishael O. Gard and Jack C. Vieley that in the event that Judge Yoder denied the Petition for Leave to Intervene, then the State's Attorney would proceed with the appeal of the case (Volume III, Page 224). On April 9, 1968, the Petitioners filed their Petition for Leave to Intervene (Volume I, C-144).

On April 15, 1968, Judge Yoder entered an Order on Motion whereby he denied Swain, Johnson & Gard's Motion for Leave to Enter as Additional Counsel for Plaintiff (Volume I, C-162). On May 1, 1968, Judge Yoder entered an Order Denying Petition for Leave to Intervene

(Volume I, C-204). On May 6, 1968, Judge Yoder entered an Order Denying Petition to Vacate Decree (Volume I, C-208). The Petitioners filed a Motion to Vacate the Order Denying the Petition for Leave to Intervene on May 29, 1968 (Volume I, C-212).

During the last two weeks of May, 1968, it became extremely difficult for Swain, Johnson & Gard and the Petitioners to contact the State's Attorney. On various occasions Mishael O. Gard and Jack C. Vieley attempted to telephone him, and Jack C. Vieley made at least two separate trips to Bloomington to speak to him. During those visits the State's Attorney indicated that he was extremely busy with his campaigning and his work on certain criminal cases (Volume III, Page 225). Some of the Petitioners came to Bloomington to speak with the State's Attorney, and they found him extremely difficult to speak to and evasive (Volume III, Page 243).

On June 3, 1968, the office of the State's Attorney notified Swain, Johnson & Gard that there would be no appeal taken by the State's Attorney and that any further action in the case would have to be taken by the Petitioners and their attorneys (Volume III, Page 225). On June 13, 1968, the State's Attorney failed to appear for oral argument of the Petitioners' Motion to Vacate Order Denying Petition for Leave to Intervene (Volume III, Page 219).

On June 5, 1968, the Petitioners filed their Notice of Appeal to the Appellate Court of Illinois, Fourth District (Volume I, C-266). On June 14, 1968, Judge Yoder entered an Order Denying Motion to Vacate Earlier Order Denying the Petition for Leave to Intervene (Volume I, C-275). On July 11, 1968, the Petitioners filed their Notice of Appeal to the Appellate Court of Illinois, Fourth District, from the Orders entered on May 1, 1968, and June 14, 1968 (Volume I, C-277).

In the Appellate Court, the Respondents petitioned the Illinois Supreme Court to invoke Illinois Supreme Court Rule 302 (d) to transfer the appeal to the Illinois Supreme Court and to permit the filing before that court of the Respondents' Motion to Dismiss Appeal. The Illinois Supreme Court denied the Respondents' request on September 25, 1968.

The Petitioners filed their brief in the Illinois Appellate Court following this ruling, and the Respondents thereupon filed their Motion to Dismiss Appeal. The matter was argued before the Appellate Court on the Respondents' Motion to Dismiss, and the opinion of that court was rendered on November 18, 1968 (Appendix, *infra*, p. A-1).

The Petitioners filed their Petition for Leave to Appeal in the Illinois Supreme Court on January 13, 1969, but their Petition was denied on March 13, 1969. In denying the Petition the Illinois Supreme Court apparently relied upon **People v. Junior College District No. 526**, 42 Ill. 2d 136, 246 N. E. 2d 292 (1969) which was entered on March 13, 1969 (Appendix D, *infra*, p. A-14). On April 7, 1969, the Petitioners filed their timely Petition for Rehearing (treated as a motion for reconsideration) in the Illinois Supreme Court, and on May 13, 1969, this Petition was denied.

The Federal question sought to be reviewed was raised in the Illinois Appellate Court during oral argument of the Respondents' Motion to Dismiss Appeal. The Federal question was raised in the Illinois Supreme Court in the Petitioners' Petition for Rehearing (motion for reconsideration).

REASONS FOR GRANTING THE WRIT.

1. The decisions rendered by the Illinois Appellate and Supreme Courts deny the Petitioners and other citizens, voters, and taxpayers in the purported school district due process of law as guaranteed by the Constitution of the United States. Until the entry of **People v. Junior College District No. 526**, 42 Ill. 2d 136, 246 N. E. 2d 292 (1969), and the order denying the Petition for Leave to Appeal, both being entered on March 13, 1969, the Illinois Supreme Court had consistently held that a school district must be in existence for a long period of time, such as two years, three years, five years, ten years, or thirteen years, before the defense of laches could be successfully asserted, and then laches could be asserted only when public detriment or inconvenience would result from a judgment of ouster. The State's Attorney and the Petitioners relied upon these prior, controlling Illinois decisions on laches, but now the Illinois Supreme Court has apparently held that a period of approximately six months delay constitutes laches, e. g., the remedy of quo warranto exists, but it must be exercised within a period of time less than six months. Such a ruling in view of the compelling circumstances of the case at bar constitutes a denial to the Petitioners and other citizens, voters, and taxpayers of procedural due process of law, using that term in its primary sense of an opportunity to be heard and to defend and maintain their substantive rights in the quo warranto action. **Brinkerhoff-Faris Trust & Sav. Co. v. Hill**, 281 U. S. 673, 678, 74 L. Ed. 1107, 1112, 50 S. Ct. 451 (1929); **N. A. A. C. P. v. State of Alabama**, 357 U. S. 449, 457, 458, 2 L. Ed. 2d 1488, 1496, 1497, 78 S. Ct. 1163 (1958).

2. The Petitioners have erroneously been denied their right to appeal the merits of the quo warranto action. The Illinois Appellate and Supreme Courts have com-

pletely ignored the mandate of Illinois Supreme Court Rule 301 that "every final judgment of a circuit court in a civil case is appealable as of right . . ." The Petitioners appealed to the Illinois Appellate Court from the trial court's order denying them leave to intervene in the quo warranto proceeding, and the Respondents filed their motion to dismiss the appeal. Since Illinois Supreme Court Rule 301 provides that "every final judgment of a circuit court in a civil case is appealable as of right . . .", the effect of such a motion at the appellate level was to question whether the Petitioners had any right to appeal. The Illinois Appellate and Supreme Courts were therefore in error when they purported to affirm the judgment of the trial court following **only** oral argument on a motion which merely raised the question of the Petitioners' right to appeal. The rationale and holding of **Brinkerhoff-Faris Trust & Sav. Co. v. Hill** is applicable to the case at bar. The Supreme Court held at 281 U. S. 682, 74 L. Ed. 1114:

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

3. To deny the Petitioners their right to appeal and argue the merits of this action is tantamount to denying all of the citizens, voters, and taxpayers of the purported school district their right to appellate review of the merits of the cause. When the State's Attorney failed to properly prosecute the case, the Petitioners became the true representatives of all of the citizens, voters, and taxpayers within the purported school district. The Petitioners then

became the true plaintiffs in the case, and as such have the right and responsibility to review the merits of the case before either the Illinois Appellate or Supreme Court.

Certainly the principles of fundamental fairness and justice dictate that the citizens, voters, and taxpayers of the purported school district have a right to judicial review of the merits of the cause and that this right should not be denied them because of the inadequate representation of the case by the State's Attorney. The Petitioners stand ready to vindicate the interest of the public in this case by appellate review of the merits. Such review should be allowed.

4. Unless the Petitioners are allowed to intervene and appeal the merits of this cause, the Petitioners and the class of citizens and taxpayers whom they represent will have been denied their day in court and their opportunity to be heard, and they will have been deprived of all existing remedies to contest the validity of the purported school district. The trial court's decree regarding the validity of the purported district will bind the entire class of citizens, voters, and taxpayers in that district because the State's Attorney filed the quo warranto suit on behalf of the People of the State of Illinois and because the State's Attorney is a representative of a class of citizens, voters, and taxpayers, including the Petitioners, residing in the purported school district. Thus the issue of the validity of the purported school district will become res judicata under Illinois law, and the Petitioners will be precluded from bringing any subsequent collateral suit to contest the validity of the purported district.

Intervention is the only avenue of attack in this cause left open to the Petitioners at this stage of the litigation. As a matter of Constitutional law the closing of this last avenue on the basis of new, novel procedural requirements cannot be done by the Illinois Appellate or Supreme Court.

"Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." **N. A. A. C. P. v. State of Alabama,** 357 U. S. 449, 457, 458, 2 L. Ed. 2d 1488, 1496, 1497, 78 S. Ct. 1163 (1958).

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACK C. VIELEY,
Counsel for Petitioners.

August 7, 1969.